JD–197-97
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERNATIONAL UNION OF
BRICKLAYERS AND ALLIED CRAFT WORKERS,

Case No. 5-CA-25837

and

OFFICE AND PROFESSIONAL
EMPLOYEES' INTERNATIONAL UNION,
LOCAL 2, AFL-CIO, CLC

Steven L. Sokolow, Esq., of Baltimore, MD,
for the General Counsel.
David R. Levinson, Esq., of Washington, DC,
for Charging Party.
James Langford, Esq., of Washington, DC,
for Respondent.

DECISION

Statement of the Case

Robert A. Giannasi, Administrative Law Judge. This case was tried in Washington, D.C. on October 6, 1997. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by threatening that employees would be discharged if they attempted to enforce the terms of the existing collective bargaining agreement between Respondent and Charging Party Union (hereafter, the Union), and Section 8(a)(3) and (1) of the Act by discharging employee Maureen Kearns because of her protected concerted and union activities. The Respondent filed an answer denying the essential allegations of the complaint, and Respondent and the General Counsel filed post-hearing briefs, which I have read and considered.

Based on the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

Findings of Fact

I. Jurisdiction

Respondent (also referred to as BAC) is an unincorporated labor organization, with a place of business in Washington, D.C., where it conducts operations in connection with the representation of employees in collective bargaining with

employers. I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and 7 of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

The General Counsel alleges that Respondent fired Kearns before the end of her 90 day probationary period because it "was concerned that [she] would file grievances upon the end of her probationary period when the contract would permit her to file grievances." (Tr 10) The General Counsel's case rests almost entirely on the testimony of the only Government witness, Kearns. It rests particularly on her testimony about two meetings she allegedly had with her boss, Respondent's Manager of Accounting, Robert Dunn, one on the day of her discharge and the other two days before. Kearns testified that Dunn told her in both of those meetings that he was afraid that she would file grievance after grievance if he kept her on after the end of her probationary period. Indeed, she testified that, in her exit interview, she told Dunn, "so you're telling me that I'm being fired for alleged future union activities?" According to Kearns, Dunn replied, "yeah. I have to get you out of here before you cause any trouble." (Tr 50) If Dunn had indeed made those statements, counsel for the General Counsel would have the type of "smoking gun" evidence that rarely comes a prosecutor's way. Alas, however, those statements were never made. I cannot credit Kearns' testimony on the statements allegedly made by Dunn or on any significant issue in this case, as I explain more fully later in this decision.

A. The Facts

Here is what actually happened, based on uncontradicted and documentary evidence and the credible testimony of Dunn, Accounts Payable Supervisor Kathy Rapp, and employee Richard Howard.

Kearns began working for Respondent as a Level 6 financial secretary on July 18, 1995. Her boss, Accounting Manager Robert Dunn, had responsibility over some 17 employees in his department. Dunn told Kearns when she was hired that Respondent's employees were covered under a collective bargaining agreement between Respondent and the Union. There is no evidence that Kearns ever sought out or met with Union officials on any matter, except for a meeting about 60 days after she began her employment, in which she was asked to join the Union in accordance with the union security provisions of the collective bargaining agreement.

One of Kearns' major job responsibilities was to place signature stamps on checks issued by Respondent, a task she performed on a daily basis. Shortly after she began working for Respondent, she also occasionally helped Richard Howard, who had recently been promoted from a Level 7 to a Level 10 financial analyst position and was performing both jobs at the time. Kearns helped Howard by typing information from employee time sheets into an Excel spreadsheet on a computer. According to Howard, Kearns' work in this respect was not altogether satisfactory as he "ended up doing more work than I had hoped." At about this time, Dunn became concerned that Kearns had been using confidential information she had learned from handling paychecks and time

sheets, and he talked to her about his concerns.

Dunn nevertheless encouraged Kearns to apply for the Level 7 position vacated by Howard, which was posted, on September 11, 1995, in accordance with the requirements of the applicable collective bargaining agreement. Kearns did so in a memo to Director of Personnel Fred Casey the next day after the job posting. In connection with the job posting, Dunn asked Kearns to take a test he had devised as a part of the application process, which he also administered to other applicants. Kearns refused to take the test, which surprised and concerned Dunn. He pressed her to take the test and she finally did so, about a week or two later, failing it miserably. She did not even answer most of the questions, which were tailored primarily to measure knowledge of basic accounting terminology.

Also sometime in September 1995, Kearns was chosen by Supervisor Kathy Rapp as one of 6 or 7 secretaries who were to attend Respondent's annual convention in Chicago and serve in a typing pool at the convention. The secretaries were to make their own arrangements, through Respondent's travel agent, to get to Chicago by the opening of the convention on Monday morning, October 2, and return after the end of the convention about noon on Friday, October 6. Kearns was expected to return to Washington on Friday, like the other secretaries, but she needed to get to Albany, New York for a personal trip the weekend following the convention. She therefore booked a return flight to Albany on Saturday morning, October 7, and a return to Washington after her personal trip. When Rapp learned, from Respondent's travel agent, that Kearns was going to Albany on Saturday for personal reasons, she talked to Kearns and told her that she would have to pay for any difference in airfare and for the Friday night stay in Chicago. She directed that the airline ticket reflect that part of it was for personal travel and she notified Respondent's travel office that Kearns would be responsible for the Friday night hotel bill.

Kearns' handling of her trip caused some turmoil in the office. Dunn stayed out of the fray because Rapp was in charge of the matter and he referred Kearns to Rapp every time she brought it up to him. Rapp herself felt that Kearns had not been "forthright" with her in scheduling and handling the trip. Eventually, it turned out that Kearns paid for the personal part of her airfare, but Respondent wound up paying for the Friday night hotel bill and other expenses incurred after noon on Friday.

According to Dunn, at some point, Kearns began telling him that he, Rapp and Casey were "out to get her" because she had to take a test for the Level 7 job she thought she deserved and because of the flap over her convention trip. It was primarily because of Kearns' "out to get her" statements, as well as her conduct and attitude in connection with the Level 7 job and the convention trip, that Dunn, after talking to Rapp and Casey, terminated Kearns on October 13, 1995, at the end of her probationary period. He told Kearns that she was not the right fit for the organization or something to that effect.

B. Credibility

Kearns testified that she was concerned that she was in jeopardy of being fired

at the end of her probationary period and mentioned that concern to Dunn in an October 11, 1995 meeting with him. She also testified that he assured her she would not be fired. Moreover, Kearns testified that, in this same meeting, she mentioned her concern about the Level 7 job she was seeking, and Dunn assured her that "the job's yours." Kearns expressed those concerns and received those assurances before Dunn allegedly told her he was afraid that, if he retained her beyond her probationary period, she would file grievance after grievance. According to Kearns, that threat followed her complaint, which she admittedly advanced for the first time in the October 11 meeting, that Howard was receiving comp time or overtime and she was not. This was a crucial expression of her alleged protected concerted activity, in the General Counsel's view of the case.[1]

I find Kearns' testimony set forth above wholly implausible. Her story is too pat. After Dunn assured her that she would not be fired and indeed would be promoted, she allegedly complained about Howard and Dunn followed with a threat. Dunn did not impress me as the type of person who would make a blatant threat to fire someone for filing grievances after giving the assurances Kearns testified about. He was calm, reserved and soft spoken on the witness stand. What strikes me as particularly beyond belief is Kearns' testimony that Dunn assured her that the Level 7 job was hers, given that she had failed to pass a test for it. Indeed, she testified she was worried about the Level 7 job, despite that assurance, when Dunn called her into his office to fire her two days later, because, according to Kearns, she "knew I did poorly on the exam." She, of course, knew, on October 11, that she had done poorly on the exam. Moreover, Kearns' complaint about the difference in treatment between her and Howard was not something that could reasonably be perceived as indicating a propensity to file grievances. At most it was a personal gripe. Dunn's response--that Howard was performing two jobs--was a true and obvious explanation for the alleged difference in treatment. There is other evidence that Dunn was quite flexible in permitting employees to make up for lost time both at the beginning and at the end of the work day. It is thus hard for me to believe that Dunn would have reacted to Kearns' complaint, which was so easy to rebut, by a threat of discharge for filing grievances. Significantly, there is no other evidence that would show that Dunn was concerned about grievance filing as a general matter. Accordingly, I have no difficulty in rejecting Kearns' testimony that Dunn made the incriminating statements attributed to him in the last few days of her employment. I credit instead Dunn's denials that he made such statements.

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[1] There is no cogent or reliable evidence about any other protected concerted activity by Kearns. She testified generally that she had several conversations with management officials about work time, but none could even remotely be termed group complaints or related to enforcement of the collective bargaining agreement. Kearns also testified that, on October 11, she told Dunn about what happened at the Chicago convention, but this too—insofar as I could understand her testimony—lacked any specificity, much less a nexus with concerted protected activity. She appeared to be complaining about not having enough work in Chicago, and to someone who had no authority over work assignments at the convention.

Kearns' testimony on other issues was likewise unreliable. Her testimony on how she handled her convention trip is not only contrary to that of Dunn and Rapp, but it sounded like a defensive and selective version of the facts. She tried to justify her actions by stating that Dunn had approved them, just as she tried to show that Dunn had offered her the Level 7 job some 4 days after it was posted. Neither of these attempts rang true. I believe that Dunn left the convention issues to Kathy Rapp, as both she and he testified. I also believe Dunn's denial that he ever offered Kearns the Level 7 job. It would make no sense for Dunn to offer her the job before she even took the test for it, which she first refused to take, then failed miserably. And the collective bargaining agreement required a posting to give consideration to other applicants. Finally, Kearns' testimony that she was actually performing most of the Level 7 job is flatly contradicted by both Howard and Dunn.

Kearns' demeanor was not that of a candid witness. She tended to exaggerate and magnify imagined slights. In contrast, the testimony of Dunn, Rapp, and Howard, sometimes mutually corroborated, adds up to a coherent story, supported by truthful, candid and reliable witnesses, two of whom, Dunn and Rapp, were no longer working for Respondent when they testified.

III. Conclusions of Law

Because of my credibility resolutions, set forth above, I cannot find that Dunn told Kearns that she or anyone else would be terminated if they filed grievances or engaged in union or other protected concerted activity. Nor can I find that Kearns was terminated because Respondent feared that she would file grievances or engage in union or other protected concerted activity. Accordingly, I find that the General Counsel has not proved, by a preponderance of the evidence, that Respondent violated Section 8(a) (3) and, or (1) of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[2]

ORDER

The complaint herein is dismissed in its entirety.

Dated, Washington, D.C. November 17, 1997

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order herein shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Robert A. Giannasi
Administrative Law Judge